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No. 04-820

IN THE

Supreme Court of the United States

CLIFFORD ACREE, *et al.*,

Petitioners,

v.

REPUBLIC OF IRAQ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CENTER FOR JUSTICE & ACCOUNTABILITY AND INTERNATIONAL LAW SCHOLARS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Center for Justice & Accountability (CJA) and the twenty-one international scholars identified in the attached Appendix hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit. Petitioners and respondent United States of America have consented to the filing of the brief *amici curiae*. The Republic of Iraq was notified of this filing but did not respond. A copy of the proposed brief is attached.

Amicus CJA is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States law and customary international law. It has filed several civil lawsuits in U.S. federal courts under the Alien Tort Statute and the Torture Victim Protection Act.

Amici international law scholars are experts in the fields of international law and human rights law. They are committed to promoting respect and compliance with the rule of law in both domestic and international fora. Thus, their participation will assist this Court in understanding the profound implications of this case.

Amici submit this brief to demonstrate that federal courts may recognize private claims under federal common law when Congress so intends for violations of international law that are universal, definable, and obligatory. As such, torture claims are actionable under federal common law pursuant to

the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act (FSIA).

The D.C. Circuit's analysis in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), contradicts the express terms of the FSIA and does not comport with the legislative record. It also contradicts this Court's recent ruling in *Sosa v. Alvarez-Machain*, __U.S.__, 124 S. Ct. 2739 (2004). In light of the mandatory venue provisions for claims against state sponsors of terrorism, the D.C. Circuit's opinion effectively bars all such actions. These errors must be corrected.

For the foregoing reasons, *Amici* respectfully request that the Court grant leave to file the attached brief *amici curiae*.

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. UNDER *SOSA v. ALVAREZ-MACHAIN*, FEDERAL COURTS MAY RECOGNIZE PRIVATE CLAIMS UNDER FEDERAL COMMON LAW WHEN CONGRESS SO INTENDS FOR VIOLATIONS OF INTERNATIONAL NORMS THAT ARE UNIVERSAL, DEFINABLE, AND OBLIGATORY	3
II. THE PROHIBITION AGAINST TORTURE IS A UNIVERSAL, DEFINABLE, AND OBLIGATORY NORM AND FALLS WITHIN THE *SOSA* FRAMEWORK	7
III. CONTRARY TO THE D.C. CIRCUIT'S ANALYSIS IN *ACREE*, TORTURE CLAIMS ARE ACTIONABLE UNDER FEDERAL COMMON LAW PURSUANT TO THE STATE SPONSOR OF TERRORISM EXCEPTION IN THE FOREIGN SOVEREIGN IMMUNITIES ACT	13
CONCLUSION	17
APPENDIX	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Abebe-Jira v. Negewo,
72 F.3d 844 (11th Cir. 1996) 10

Acree v. Republic of Iraq,
370 F.3d 41 (D.C. Cir. 2004) 2, 3, 16, 17

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 14

Barrueto v. Larios,
205 F. Supp. 2d 1325 (S.D. Fl. 2002) 11

Cicippio-Puleo v. Islamic Republic of Iran,
353 F.3d 1024 (D.C. Cir. 2004) 16

Doe v. Unocal,
963 F. Supp. 880 (C.D. Cal. 1997) 11

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) ..... *passim*

Flores v. Southern Peru Copper Corp.,
343 F.3d 140 (2d Cir. 2003) 6

Forti v. Suarez-Mason,
672 F. Supp. 1531 (N.D. Cal. 1987) 11

Cited Authorities

Page

Hilao v. Marcos,
103 F.3d 789 (9th Cir. 1996) 10

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25 F.3d 1467 (9th Cir. 1994) 10

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) 6, 10

Martinez v. City of Los Angeles,
141 F.3d 1373 (9th Cir. 1998) 7

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322 (N.D. Ga. 2002) 11

Mohammad v. Bin Tarraf,
144 Fed. Appx. 417 (2d Cir. 2004) 11

Papa v. United States,
281 F.3d 1004 (9th Cir. 2002) 6

Paul v. Avril,
901 F. Supp. 330 (S.D. Fla. 1994) 11

Presbyterian Church of the Sudan v. Talisman Energy, Inc.,
244 F. Supp. 2d 289 (S.D.N.Y. 2003) 10

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965 F.2d 699 (9th Cir. 1992) 10

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Page

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234 F. Supp. 2d 401 (S.D.N.Y. 2002) 10-11

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978 F.2d 493 (9th Cir. 1992) 10

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18 U.S. 153, 5 Wheat. 153,
5 L. Ed. 57 (1820) 6

Wiwa v. Royal Dutch Petroleum Company,
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(S.D.N.Y. 2002) 10

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886 F. Supp. 162 (D. Mass. 1995) 11

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Page

Statutes and Codes:

United States Code
Title 28, section 1330(a) 2

United States Code
Title 28, section 1331 15

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Title 28, section 1350 5

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Title 28, section 1391(f) 3

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Title 28, section 1605 (f) 14

United States Code
Title 28, section 1605 (g) 14

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Rules and Regulations:

Supreme Court Rule 37.6 1

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Page

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H.R. Rep. No. 103-702 (1994) 13

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Page

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Page

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INTEREST OF *AMICI CURIAE*

This *amici* brief is respectfully submitted in support of the petition for writ of certiorari to the Court of Appeals for the District of Columbia Circuit by the Center for Justice & Accountability and the twenty-one international law scholars identified in the attached Appendix.[1]

Amicus Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States law and customary international law. It has filed several civil lawsuits in U.S. federal courts under the Alien Tort Statute and the Torture Victim Protection Act.

Amici international law scholars are experts in the fields of international law and human rights law. They are committed to promoting respect and compliance with the rule of law in both domestic and international fora. Thus, their participation will assist this Court in understanding the profound implications of this case.

While *Amici Curiae* pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights. *Amici* believe that the narrow principle set forth in *Sosa v. Alvarez-Machain,* __U.S.__, 124 S. Ct. 2739

[1] *Amici Curiae* certify that no counsel for either party authored the brief in whole or in part and that no person or entity, other than *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of this brief. S. Ct. R. 37.6. This brief is submitted with the consent of petitioners and respondent United States of America. The Republic of Iraq was notified of this filing but did not respond.

(2004), which recognizes a limited right of action under federal common law for serious human rights abuses, should apply to former U.S. prisoners of war alleging torture in cases of state sponsored terrorism pursuant to the Foreign Sovereign Immunities Act.

SUMMARY OF ARGUMENT

In 1996, Congress adopted legislation amending the Foreign Sovereign Immunities Act (FSIA) to allow claims against countries that are designated state sponsors of terrorism. 28 U.S.C. § 1605(a)(7); 28 U.S.C. § 1330(a). In subsequent legislation, Congress expanded the scope of liability for these state sponsors of terrorism. *See, e.g.*, Civil Liability for Acts of State Sponsored Terrorism, Pub. L. 104-208, § 589, 110 Stat. 3009; Victims of Trafficking and Violence Protection Act, Pub. L. 106-386, § 2002(a), 114 Stat. 1543; Terrorism Risk Insurance Act, Pub. L. 107-297, 116 Stat. 2322. The FSIA now provides victims of state sponsored terrorism – from torture and extrajudicial killing to hostage taking and aircraft sabotage – with the ability to seek redress for their injuries in U.S. courts.

In *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), the D.C. Circuit held that the state sponsor of terrorism exception codified in § 1605(a)(7) of the FSIA is merely a jurisdictional grant and that plaintiffs require an independent federal cause of action even for claims of torture. The Court of Appeals did not consider the availability of a cause of action under federal common law. It therefore dismissed the claims of seventeen former U.S. prisoners of war and their families, finding no such cause of action for torture in federal law.

This Court should grant the petition for *certiorari* to remedy the fundamental errors of the opinion below. The D.C. Circuit's analysis contradicts the express terms of the FSIA and does not

comport with the legislative record. The D.C. Circuit's analysis also contradicts this Court's recent ruling in *Sosa v. Alvarez-Machain*, which authorizes federal courts to recognize private claims under federal common law when Congress so intends for violations of international norms that are universal, definable, and obligatory. Indeed, *Sosa* makes abundantly clear that the prohibition against torture constitutes such an actionable claim under federal common law. Significantly, the D.C. Circuit's opinion in *Acree* was issued prior to the Supreme Court's ruling in *Sosa*. Accordingly, this Court should also consider granting the petition, vacating the D.C. Circuit's opinion, and remanding so that the lower courts can properly consider and apply the standards set forth in *Sosa*.

To allow the D.C. Circuit's analysis to stand would establish an odd dichotomy – allowing aliens to sue under a limited cause of action found in federal common law but denying a similar right to former U.S. prisoners of war who have been tortured. It would also send the wrong message to perpetrators of such egregious acts. In light of the mandatory venue provisions for claims against state sponsors of terrorism, 28 U.S.C. § 1391(f), the D.C. Circuit's opinion effectively bars all such actions.

ARGUMENT

I. UNDER *SOSA v. ALVAREZ-MACHAIN*, FEDERAL COURTS MAY RECOGNIZE PRIVATE CLAIMS UNDER FEDERAL COMMON LAW WHEN CONGRESS SO INTENDS FOR VIOLATIONS OF INTERNATIONAL NORMS THAT ARE UNIVERSAL, DEFINABLE, AND OBLIGATORY

In *Sosa v. Alvarez-Machain*, this Court examined the law of nations and its status as part of federal common law. As a preliminary matter, the Court found that the United States upon

independence had received the law of nations "in its modern state of purity and refinement."[2] *Sosa*, 124 S. Ct. at 2755. *See also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 595 (2002); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 842-45 (1989). The law of nations was, therefore, a part of the common law.[3]

While one element of the law of nations was limited to the obligations of states *inter se*, a second element "did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." *Sosa*, 124 S. Ct. at 2756. There was also "a sphere in which these rules binding individuals for the benefit of other individuals overlapped with

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[2] *See also* Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), *quoted in* Stewart Jay, *The Status of the Law of Nations in Early American Law* 42 Vand. L. Rev. 819, 825 (1989) ("The Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where the nature of the subject requires it."); 1 Op. Att'y Gen. 26, 27 (1792) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.").

[3] There is vast support for this basic principle of federal law. *See, e.g.*, Jordan Paust, *International Law as Law of the United States* 1-16 (2d ed. 2003); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int'l L. 687, 702 (2002); Harold Koh, *Is International Law Really State Law*, 111 Harv. L. Rev. 1824 (1998); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463 (1997); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1280 (1996); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1557 (1984).

the norms of state relationships." *Id. Cf.* Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DePaul L. Rev. 433 (2002).

It was at this jurisdictional nexus between individual and state responsibilities where "torts in violation of the law of nations were understood to be within the common law." *Sosa*, 124 S. Ct. at 2759. Not all claims alleging violations of international law were actionable under the common law, however. In *Sosa*, the Court recognized that only those claimed violations of the law of nations that were definite and "threatened serious consequences in international affairs" were actionable under the common law. *Id.* at 2756.

To determine whether violations of international law are *now* actionable under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, the Court indicated that such claims must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 2761-62. In fact, this cautious approach "is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached" the Supreme Court (*id.* at 2765-66):

> [F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. *See, e.g., United States v. Smith,* 18 U.S. 153, 5 Wheat. 153, 163-180, 5 L. Ed. 57 (1820) (illustrating the specificity with which the law of nations defined piracy).

Id. at 2765. The Court presented this standard – definite content and widespread acceptance – as a stringent test intended to

prevent litigation of claims for lesser, more parochial, or idiosyncratic abuses.[4] According to the Court, the three historical paradigms that were probably on the minds of the drafters of the ATS were: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 2761. *See also* 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769).

To recognize private claims under the law of nations, therefore, *Sosa* requires the existence of international norms that are: universal (accepted by the international community); definable (clear and articulable content); and obligatory (establishing binding obligations).

The logic of the *Sosa* standard is well-recognized by the federal courts.[5] The Second Circuit has stated that well-established universal norms of international law are required for adjudicating suits brought under the Alien Tort Statute. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The Ninth Circuit has also echoed this approach, indicating that ATS cases are limited to violations of "specific, universal, and obligatory international norms." *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir.

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[4] In *Sosa*, the Court offered *United States v. Smith* as a model for illustrating the specificity with which the law of nations defines specific norms. In the absence of an international consensus over the definition of piracy, the Court in *Smith* looked to scholarship, custom, and domestic judicial opinions. "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id.* at 160-161.

[5] Even Justice Scalia's dissent in *Sosa* correctly recognized that the majority opinion endorsed the same standard applied by many lower courts. *Sosa*, 124 S. Ct. at 2776.

2002); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998).

In sum, the *Sosa* decision establishes that the federal courts may recognize private claims under federal common law when Congress so intends for violations of international norms that are universal, definable, and obligatory.

II. THE PROHIBITION AGAINST TORTURE IS A UNIVERSAL, DEFINABLE, AND OBLIGATORY NORM AND FALLS WITHIN THE *SOSA* FRAMEWORK

In *Sosa*, 124 S. Ct. 2765-66, the Supreme Court cited three modern cases for the proposition that the federal courts may recognize private claims under federal common law for violations of international norms that are universal, definable, and obligatory. Significantly, each of these cases makes clear that the prohibition against torture constitutes such a norm.

In *Filartiga v. Pena-Irala*, for example, the Second Circuit held that an actionable norm under the ATS must "command the general assent of civilized nations" and be capable of "clear and unambiguous" definition.[6] *Filartiga*, 630 F.2d at 881, 884. Torture constituted such a norm. "Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – we conclude that official torture is now prohibited by the law of

[6] *Filartiga* established the evidentiary standard adopted by *Sosa*: an international norm must be both generally accepted by "civilized nations" and unambiguously defined. Moreover, *Filartiga* based its formulation on the very same Supreme Court precedent relied on by *Sosa*. Both cases cite *The Paquete Habana*, which recognized that a binding international law norm must command "the general assent of civilized nations" and constitute "a settled rule of international law." *The Paquete Habana*, 175 U.S. 677, 694 (1900).

nations." *Id.* at 884. Indeed, "[t]he prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." *Id.* "[F]or purposes of civil liability [therefore], the torturer has become – like the pirate and slave trader before him – *hostis humani generis,* an enemy of all mankind." *Id.* at 890.

The second decision cited by the Supreme Court in *Sosa* is Judge Edward's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). In *Tel-Oren*, the D.C. Circuit dismissed an ATS lawsuit in a *per curiam* decision, with each judge issuing separate concurring opinions. In his opinion, Judge Edwards proclaimed adherence to the legal principles established in *Filartiga*.[7]

[7] Judge Edwards also provided some guidance for identifying those offenses, like torture, that violate current norms of international law.

> To identify such crimes, I look for guidance to the RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 702 (Tent. Draft No. 3, 1982), which enumerates as violations of international law state-practiced, -encouraged or -condoned (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) consistent patterns of gross violations of internationally recognized human rights. *See also* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53, 90 (1981) (focusing on genocide, summary execution, torture and slavery as core human rights violations). I, of course, need not determine whether each of these offenses in fact amounts to a law of nations violation for section 1350 purposes. The point is simply that commentators have begun to identify a handful of
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> (Cont'd)

He also acknowledged that only a handful of international claims would be subject to civil liability under the ATS, including torture:

> At this point, it is appropriate to pause to emphasize the extremely narrow scope of section 1350 jurisdiction under the *Filartiga* formulation. Judge Kaufman characterized the torturer in *Filartiga* as follows: "Indeed, for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890. The reference to piracy and slave-trading is not fortuitous. Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them.

Id. at 781.[8]

(Cont'd)

> heinous actions – each of which violates definable, universal and obligatory norms, *see* Blum & Steinhardt, *supra*, at 87-90 – and in the process are defining the limits of section 1350's reach. [footnote omitted]

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). (Edwards, J., concurring).

[8] Judge Bork, in his concurring opinion, also acknowledged the status of torture under international law. *See Tel-Oren*, 726 F.2d at 819-20 (Bork, J., concurring) ("[T]he proscription of official torture [is] a principle that is embodied in numerous international conventions and declarations, that is 'clear and unambiguous' . . . and about which there is universal agreement 'in the modern usage and practice of nations.'").

The third case cited by the Supreme Court in *Sosa* is *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994). In *Marcos*, the Ninth Circuit indicated that not every violation of international law constitutes an actionable claim under the ATS. Citing *Filartiga* and *Tel-Oren*, the Ninth Circuit indicated that actionable violations of international law must involve norms that are "specific, universal, and obligatory." *Id.* at 1475. In *Marcos*, the prohibition against torture was found to constitute such a universal, definable, and obligatory standard.

> The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.

Id. at 1475.

These three cases cited by the Supreme Court are not unique in their approach to torture. Federal courts have consistently found that the prohibition against torture constitutes a universal, definable, and obligatory norm. *See, e.g.*, *Hilao v. Marcos*, 103 F.3d 789 (9th Cir. 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992); *Siderman de Blake v. Republic*, 965 F.2d 699 (9th Cir. 1992); *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002); *Tachiona v.*

Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1331 (S.D. Fl. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987). Post-*Sosa* rulings affirm this principle. *See, e.g.*, *Mohammad v. Bin Tarraf*, 144 Fed. Appx. 417, 419 (2d Cir. 2004) (unpublished opinion).

Such uniformity should not be surprising. Few international norms are more firmly established than the prohibition against torture. It is recognized in every major human rights instrument. *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, entered into force March 23, 1976, art. 7, 999 U.N.T.S. 171;[9] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, art. 2, 1465 U.N.T.S. 85;[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, art. 3, 213 U.N.T.S. 221;[11] American Convention on Human Rights, entered into force July 18, 1978, art. 5(2), 1144 U.N.T.S. 123;[12] African Charter on Human and Peoples'

[9] As of January 1, 2005, there are 154 States Parties to the International Covenant on Civil and Political Rights. The United States has ratified the International Covenant.

[10] As of January 1, 2005, there are 139 States Parties to the Convention against Torture. The United States has ratified the Convention against Torture.

[11] As of January 1, 2005, there are 45 States Parties to the European Convention.

[12] As of January 1, 2005, there are 25 States Parties to the American Convention. The United States has signed (but not ratified) the American Convention.

Rights, entered into force Oct. 21, 1986, art. 5, OAU Doc. CAB/ LEG/67/3/Rev. 5.[13]

The Third Geneva Convention Relative to the Treatment of Prisoners of War, which is directly applicable to the Petitioners' case, affirms the fundamental character of the universal prohibition against torture and its application even in times of armed conflict.[14] Geneva Convention Relative to the Treatment of Prisoners of War, entered into force Oct. 21, 1950, 75 U.N.T.S. 135. The Third Geneva Convention prohibits torture and inhuman treatment of prisoners of war. *Id.* at art. 130. Indeed, such acts constitute grave breaches under the Geneva Convention, subjecting the perpetrator to criminal liability. *Id.* at art. 129. Significantly, "[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of" such grave breaches. *Id.* at art. 131. *See generally III Geneva Convention Relative to the Treatment of Prisoners of War* 617-630 (Jean S. Pictet ed. 1960).

In sum, *Sosa* and its antecedents, along with the extraordinary international consensus on this point, make it abundantly clear that the prohibition against torture is a universal, definable, and obligatory norm.

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[13] As of January 1, 2005, there are 53 States Parties to the African Charter.

[14] As of January 1, 2005, there are 192 States Parties to the Third Geneva Convention. The United States has ratified the Third Geneva Convention.

III. CONTRARY TO THE D.C. CIRCUIT'S ANALYSIS IN *ACREE*, TORTURE CLAIMS ARE ACTIONABLE UNDER FEDERAL COMMON LAW PURSUANT TO THE STATE SPONSOR OF TERRORISM EXCEPTION IN THE FOREIGN SOVEREIGN IMMUNITIES ACT

If federal common law recognizes a limited right of action for violations of international law that are universal, obligatory, and definable in ATS cases, surely this logic applies with equal force to claims of torture litigated under the state sponsor of terrorism exception in the FSIA.[15] Given the marked evidence of congressional intent in the FSIA, there is no principled basis for distinguishing between these two classes of plaintiffs-victims.

Holding torture claims actionable under the state sponsor of terrorism exception in the FSIA is consistent with this Court's ruling in *Sosa*. Indeed, the parallels between the ATS analysis in *Sosa* and the FSIA analysis in this case are striking.

In *Sosa*, for example, the Court noted that "Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; . . ." *Sosa*, 124 S. Ct. at 2765. A comparable congressional assumption exists in this case. *See* H.R. Rep. No. 103-702, at 2 (1994) (purpose of the state sponsor of terrorism exception was to allow U.S. citizens "to maintain a federal cause of action for damages against the foreign government involved.").[16]

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[15] *Cf.* Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911*, 36 Geo. Wash. Int'l L. Rev. 1, 30 (2004).

[16] The FSIA text supports the argument that Congress assumed

(Cont'd)

In *Sosa*, the Court noted that Congress had not challenged *Filartiga* and its progeny and had, in fact, responded "by enacting legislation supplementing the judicial determination in some detail." *Id.* at 2765. A comparable congressional response exists in this case. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. 104-208, § 589, 110 Stat. 3009; Victims of Trafficking and Violence Protection Act, Pub. L. 106-386, § 2002(a), 114 Stat. 1543; Terrorism Risk Insurance Act, Pub. L. 107-297, 116 Stat. 2322.

Sosa is instructive in yet another respect. In *Sosa*, 124 S. Ct. at 2762, the Court recognized the power of the federal courts "to create federal common law rules in interstitial areas of particular federal interest." The Court cited the foreign affairs realm as one such area.[17] The Court indicated, however, that "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Id.* And, in this respect, the Court expressed some caution about recognizing private claims under federal common law. "We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role

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(Cont'd)
the existence of causes of action for certain acts of state sponsored terrorism. This would explain the various references to claims and causes of action in the text. *See, e.g.*, 28 U.S.C. § 1605 (f)-(g) .

[17] *Accord, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) ("[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."). *See also* Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

in the field have not affirmatively encouraged greater judicial activity." *Id.* at 2763.

But such concerns are simply not evident in the present case. Congress has spoken, and spoken often. There is a clear mandate set forth in the legislative record and accompanying statutory scheme that victims of state sponsored terrorism are entitled to compensation for their injuries. Indeed, the congressional mandate in this area far exceeds the more modest mandate recognized by the Court in *Sosa.*

For these reasons, the federal courts may recognize torture claims as a matter of federal common law under the Foreign Sovereign Immunities Act even though a comparable power may not exist under 28 U.S.C. § 1331. In *Sosa*, 124 S. Ct. at 2765, the Court rejected Justice Scalia's concerns that accepting a federal court's ability to recognize private claims under federal common law would extend such power to the grant of federal question jurisdiction under 28 U.S.C. § 1331. The Court correctly focused on the unique status of the ATS and congressional understanding of the statute to distinguish its jurisdictional grant from the jurisdictional grant set forth in § 1331. *See* Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 Brook. L. Rev. 533, 549 (2005). In the present case, the jurisdictional grant set forth in the FSIA with respect to claims of torture perpetrated by state sponsors of terrorism is more akin to the ATS than § 1331.

Finally, doctrines of judicial abstention do not apply in this case. While comity concerns may limit a court's ability to recognize a private right of action in some cases, such concerns are not evident here. Torture is one of the few international norms that reflect both substantive agreement as to its underlying prohibition and procedural agreement as to the appropriate

response for such acts. As Justice Breyer rightly noted in his concurring opinion in *Sosa*, litigating claims of torture "will not significantly threaten the practical harmony that comity principles seek to protect." *Sosa*, 124 S. Ct. at 2783.

In *Acree v. Republic of Iraq*, 370 F.3d at 43, the D.C. Circuit held that the state sponsor of terrorism exception codified in § 1605(a)(7) of the FSIA is merely a jurisdictional grant and that plaintiffs require an independent federal cause of action even for claims of torture. The Court of Appeals did not consider the availability of a cause of action under federal common law. Significantly, the *Acree* ruling pre-dates this Court's opinion in *Sosa*.[18]

In sum, and contrary to the D.C. Circuit's analysis in *Acree*, torture claims are actionable under federal common law pursuant to the state sponsor of terrorism exception in the Foreign Sovereign Immunities Act.

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[18] In *Acree*, the D.C. Circuit relied on its earlier ruling in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1036 (D.C. Cir. 2004), a decision that also pre-dates this Court's decision in *Sosa*.

CONCLUSION

The D.C. Circuit's analysis in *Acree v. Republic of Iraq* contradicts the express terms of the FSIA and does not comport with the legislative record. It also contradicts this Court's recent ruling in *Sosa v. Alvarez-Machain.* In light of the mandatory venue provisions for claims against state sponsors of terrorism, the D.C. Circuit's opinion effectively bars all such actions. These errors must be corrected.

Accordingly, this Court should grant the petition for *certiorari* to remedy the fundamental errors of the opinion below. In the alternative, this Court should consider granting the petition, vacating the D.C. Circuit's opinion, and remanding so that the lower courts can properly consider and apply the standards set forth in *Sosa.*

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APPENDIX

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